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## The *Pringle* Judgment: Economic and/or Monetary Union?

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*INTRODUCTION*

At its inauguration in October 2012, the European Stability Mechanism (“ESM”) was hailed by European political leaders and top EU officials as a historic milestone in shaping the future of the ailing Economic and Monetary Union (“EMU”). Set forth in the Treaty Establishing the European Stability Mechanism (“ESM Treaty” or “TESM”),<sup>1</sup> the ESM was introduced to provide stability support to euro area Member States experiencing severe financing problems as a result of the ongoing sovereign debt crisis. Apparently, those leaders and officials did not expect that the Court of Justice of the European Union (“CJEU” or “the Court”), which still had to rule on the compatibility of the ESM Treaty with the Union Treaties,<sup>2</sup> would spoil their party. They were right. The *Pringle* judgment,<sup>3</sup> which followed less than two months later, gave the ESM Treaty the final stamp of approval and paved the way for new financial assistance programs.

The judgment is significant for several reasons. First and foremost, the Court’s interpretation of the ‘no-bailout’ clause,<sup>4</sup> a key provision underpinning the EMU, has the practical effect of authorizing future financial assistance by the ESM *as well as* previously agreed programs currently in place under various temporary financial assistance mechanisms.<sup>5</sup> The Court answered the fundamental question of whether Member States are allowed under the Union Treaties to provide stability support to each other. Also of practical relevance, it ruled that the Union’s institutions—more specifically the European Commission, the European Central Bank (“ECB”), and the

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1. Treaty Establishing the European Stability Mechanism, Feb. 2, 2012, [hereinafter TESH], available at <http://www.european-council.europa.eu/media/582311/05-tesm2.en12.pdf>.

2. Consolidated Version of the Treaty on European Union, 2012 O.J. C 326/13 [hereinafter TEU]; Consolidated Version of the Treaty on the Functioning of the European Union, 2012 O.J. C 326/47 [hereinafter TFEU]. In this Article, these two foundational treaties are referred to as the “Union Treaties.”

3. Thomas Pringle v. Gov’t of Ireland, Case C-370/12, [2012] E.C.R. I\_\_\_\_ (delivered Nov. 27, 2012).

4. See TFEU, *supra* note 2, art. 125(1), 2012 O.J. C 326, at 99.

5. On this later point, see Vestert Borger, *The ESM and the European Court’s Predicament in Pringle*, 14 GERMAN L.J. 113, 132 (2013).

Court itself—could be ‘borrowed’ by the euro area Member States within the context of the ESM.

The judgment also has constitutional significance. Monetary policy for the euro area Member States is an exclusive competence of the Union.<sup>6</sup> Where the Union Treaties confer on the Union such competence, only the Union may legislate and adopt legally binding acts. The Member States are only allowed to do so themselves if they are empowered by the Union or for the implementation of Union acts.<sup>7</sup> Yet, over the course of the sovereign debt crisis, the Member States on several occasions resorted to the adoption of legally binding acts, namely international agreements, which have as their object the enhancement or further development of the EMU. While the Member States are required to coordinate their economic policies within the Union,<sup>8</sup> the Union Treaties leave them much room to maneuver with regard to economic policy. However, it is debatable whether Member States can still act through ‘ordinary’ international agreements in an area over which they have transferred exclusive powers to the Union (i.e., the Economic *and* Monetary Union). In order to avoid answering this question, the Court had to draw a hard line between monetary policy and economic policy. This raises questions as to what extent the highly centralized Monetary Union and the hitherto underdeveloped Economic Union are interrelated. In light of the *Pringle* judgment it is perhaps more appropriate to think of the EMU as an ‘Economic and/or Monetary Union.’

The judgment, furthermore, marks the first time the Court was called upon to rule on the use of the simplified revision procedure under article 48(6) of the Consolidated Version of the Treaty on European Union (“TEU”), as introduced by the Lisbon Treaty. The euro area Member States opted to establish the ESM outside the framework of the Union Treaties. To facilitate this move and take away doubts as to the compatibility of the new stability mechanism with the ‘no-bailout’ clause, the European Council agreed to add the following paragraph to article 136 of the Treaty on the Functioning of the European Union (“TFEU”):

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6. TFEU, *supra* note 2, art. 3(1)(c), 2012 O.J. C 326, at 51.

7. *Id.* art. 2(1), at 50.

8. *Id.* arts. 2(3), 5(1), at 50, 52.

3. The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.<sup>9</sup>

This amendment had to be approved by all twenty-seven EU Member States before it could enter into force, simultaneously with the ESM Treaty, on January 1, 2013. However, in reaction to increased market tensions,<sup>10</sup> euro area leaders later resolved to have the ESM Treaty enter into force by mid-2012. In *Pringle*, the Court was asked whether the decision amending article 136 TFEU was valid and, if so, whether the ESM could actually be established before the entry into force of that decision.

Section I of this Article will set out the factual and procedural background of the case, which originated from a request for a preliminary ruling by the Irish Supreme Court. Section II will scrutinize the judgment with regard to the three preliminary questions referred. It will contain an initial analysis and provide context. Further commentary on specific elements of the case can be found in Section III.

### I. *FACTUAL BACKGROUND AND PROCEDURE*

On August 3, 2012, the Irish Supreme Court made a reference for a preliminary ruling in proceedings brought by Thomas Pringle, T.D., a member of the Irish Parliament.<sup>11</sup> Mr. Pringle sought a declaration that the insertion of article 136(3) TFEU constitutes an unlawful amendment of the TFEU, and also sought an injunction preventing Ireland from ratifying, approving, or accepting the ESM Treaty. The reference concerned the validity of the decision amending article 136 TFEU and the interpretation of various provisions of the Union Treaties. A preliminary ruling was necessary for the Supreme

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9. European Council Decision No. 2011/199/EU (*Amending Art. 136 TFEU*), 2011 O.J. L 91/1.

10. See Statement by the Euro Area Heads of State or Government, Brussels European Council—9 December 2011, EUR. COUNCIL, 67 (Jan. 2012), *available at* <http://www.european-council.europa.eu/media/555285/qcao11001enc.pdf>.

11. For the application, see 2012 O.J. C 303/18. The preliminary reference procedure is laid down in article 267 TFEU, *supra* note 2, 2012 O.J. C 326, at 164.

Court to assess whether Ireland would breach its obligations under EU law by adopting and ratifying the ESM Treaty. Considering the matter to be one of exceptional urgency, the Supreme Court requested the CJEU to apply an accelerated procedure.<sup>12</sup> It offered that the timely ratification of the ESM Treaty by Ireland was of the utmost importance to the other Contracting Parties, especially those in need of financial assistance.<sup>13</sup> In reality, the other Contracting Parties could have easily proceeded without Ireland,<sup>14</sup> although that would have undermined the credibility of the new stability mechanism. It did not come that far, however, as the Supreme Court declined to grant an injunction restraining Ireland from ratifying the ESM Treaty. Thereby it also effectively ruled out the possibility of an Irish referendum on the matter.<sup>15</sup>

All Contracting Parties subsequently ratified the ESM Treaty. A major hurdle in this respect was overcome when the German Federal Constitutional Court (“GFCC”) ruled that Germany, the largest contributor to the ESM’s capital stock, could proceed with the ratification. Shortly thereafter, on September 27, 2012, the ESM Treaty entered into force. Nonetheless, by order of the President of the CJEU of October 4, 2012, the request of the Irish Supreme Court was granted so as to remove as soon as possible any uncertainty as to the validity of the ESM Treaty, “which adversely affects the objective of the

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12. See Protocol (No. 3) on the Statute of the Court of Justice of the European Union art. 23a, 2012 O.J. C 326/210, at 216. In the judgment, the Court referred to article 105(1)—formerly article 104a—of the Rules of Procedure of September 25, 2012, 2012 O.J. C 337/1, which entered into force on November 1, 2012.

13. Order of the President of the Court, Case C-370/12, ¶¶ 1–5 (Oct. 4, 2012).

14. Article 48 of the TESM, *supra* note 1, stipulates that the ESM Treaty enters into force upon ratification by Contracting Parties representing 90% of the total subscriptions to the ESM’s authorized capital stock. Since Ireland’s contribution amounts to less than 1.6% thereof, the Supreme Court may have been overly generous in its assessment of this particular Member State’s influence on European affairs. In fact, only Germany, Spain, France, and Italy retained their power to ‘veto’ the ESM Treaty.

15. The applicant had argued that the participation by the Irish Government in the adoption and ratification of the ESM Treaty was contrary to the Constitution of Ireland and called for a referendum on the issue. As may be remembered, Ireland has a history of difficult referendums on major European Treaties which impact its Constitution. See, e.g., JEAN-CLAUDE PIRIS, THE LISBON TREATY: A LEGAL AND POLITICAL ANALYSIS 49, 51 & n.81 (2010). For the judgment, see *Thomas Pringle v. Ireland*, [2012] IESC 47, Record No. 339/2012 (Ir.).

ESM Treaty, namely to maintain the financial stability of the euro area.”<sup>16</sup> On October 23, 2012, therefore, a host of Member States and three EU institutions, displaying a seldom-seen unity, lined up in Luxembourg to defend the newly established crisis resolution mechanism. This demonstrates that they deemed the ESM of crucial importance not just for the euro area, but for the Union as a whole.

The ESM is an international financial institution with full legal personality, established by the euro area Member States under public international law.<sup>17</sup> It assumes the tasks previously fulfilled by the European Financial Stabilization Mechanism (“EFSM”) and the European Financial Stability Facility (“EFSF”), two temporary financial assistance mechanisms devised in May 2010 as part of a “comprehensive package of measures to preserve financial stability in Europe.”<sup>18</sup> These mechanisms go hand in hand with recent efforts to reinforce economic governance within the euro area. In fact, the granting of financial assistance under the ESM has been made conditional on the ratification of the so-called Fiscal Compact Treaty<sup>19</sup> by the ESM Member concerned.<sup>20</sup> Since critics of previous euro rescue measures<sup>21</sup> had questioned their compatibility with the ‘no-bailout’ clause, the Member States

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16. Order of the President of the Court, *supra* note 13, ¶¶ 6–7.

17. TESM, *supra* note 1, arts. 1(1) 32(2)

18. Press Release 9596/10 (Presse 108), Council of the European Union, Extraordinary Council Meeting (May 9, 2010). The European Financial Stability Mechanism (“EFSM”) was established by a Regulation based on article 122(2) TFEU, *supra* note 2, 2012 O.J. C 326, at 98. It allows the European Commission to contract on behalf of the Union borrowings on the capital markets or with financial institutions up to EU€60 billion under an EU budget guarantee. *See* Council Regulation No. 407/2010/EU on Establishing a European Financial Stabilization Mechanism, 2010 O.J. L 118/1 [hereinafter EFSM Regulation]. The European Financial Stability Facility (“EFSF”) covers the remaining EU€440 billion of the agreed package. The facility takes the form of a special purpose vehicle. It was established as a public limited liability company governed by Luxembourgish private law, owned by the euro area Member States. *See* European Financial Stability Facility, Société Anonyme, *Journal Officiel du Grand-Duché de Luxembourg*, June 8, 2010, Memorial C–No. 1189, at 57026.

19. Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, March 2, 2012 [hereinafter Fiscal Compact Treaty], *available at* [http://www.eurozone.europa.eu/media/304649/st00tscg26\\_en12.pdf](http://www.eurozone.europa.eu/media/304649/st00tscg26_en12.pdf).

20. *See* Preamble to TESM, *supra* note 1.

21. *See, e.g.,* Lothar Knopp, *Griechenland—Nothilfe auf dem Verfassungsrechtlichen Prüfstand*, 63 NEUE JURISTISCHE WOCHENSCHRIFT 1777 (2010); Matthias Ruffert, *The European Debt Crisis and European Union Law*, 48 COMMON MKT. L. REV. 1777 (2011).

agreed that a permanent ‘bailout fund’ (as the envisaged ESM was labeled by non-believers) would need a more solid grounding in the Union Treaties to withstand future challenges before the courts. However, their decision to amend article 136 TFEU via a new simplified revision procedure, less than a year after the troubled entry into force of the Lisbon Treaty, only added fuel to the fire.

The Irish Supreme Court referred three questions to the CJEU.<sup>22</sup> It sought to ascertain, firstly, whether European Council Decision 2011/199 is valid insofar as it amends article 136 TFEU by providing for the insertion, on the basis of the simplified revision procedure under article 48(6) TEU, of a third paragraph relating to the establishment of the ESM. Secondly, the Supreme Court sought to ascertain whether articles 2, 3, 4(3), and 13 TEU, and articles 2(3), 3(1)(c), 3(2), 119 to 123, and 125 to 127 TFEU, and the general principles of effective judicial protection and legal certainty, preclude a euro area Member State from concluding and ratifying an agreement such as the ESM Treaty. Thirdly, it asked whether said Member States may conclude and ratify the ESM Treaty before the entry into force of the aforementioned European Council Decision.

Mr. Pringle argued before the CJEU that participation by euro area Member States in the ESM Treaty is incompatible with their obligations under article 125 TFEU. He stated that the European Council had correctly assessed that an amendment of the Union Treaties would be necessary to permit a permanent stability mechanism, but submitted that the rule of law requires that the amendment take effect before said mechanism is established. Mr. Pringle further disputed the chosen procedure for the amendment; fundamental changes to the EU legal order, he argued, cannot be adopted using a simplified revision procedure.

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22. Given that the highest courts of the Member States are under an obligation to refer questions on the interpretation of the Union Treaties and the validity and interpretation of acts of the Union’s institutions to the Court of Justice of the European Union (“CJEU”), the German Federal Constitutional Court should have already brought the matter before the Court.



## II. *THE JUDGMENT OF THE COURT*

Little over a month after the hearing, sitting as a full Court of twenty-seven judges for the first time in a preliminary reference procedure, the CJEU confirmed the validity of the decision amending article 136 TFEU and the compatibility of the ESM Treaty with EU law. In this section, the three preliminary questions will be discussed in their original order.

### A. *Question 1: The Validity of the Decision Amending Article 136 TFEU*

The European Council, the Commission, and several intervening Member States contested the jurisdiction of the CJEU to examine the first preliminary question concerning the validity of the decision amending article 136 TFEU. They contended that the Court has no power under article 267 TFEU to assess the validity of provisions of primary EU law.<sup>23</sup> However, as the Court argued, while it is true that the decision concerns the insertion of a new provision of primary law, the question of validity concerns an act of one of the Union's institutions, namely the European Council. Therefore, whenever the European Council uses the simplified revision procedure under article 48(6) TEU, it falls to the Court to verify firstly that the procedural rules laid down in article 48(6) TEU were followed, and, secondly, subject to the third paragraph thereof, that the amendments decided upon concern only Part Three of the TFEU.<sup>24</sup>

The Court first examined whether the amendment envisaged by the decision concerns solely provisions of Part Three of the TFEU on the Union's policies and internal actions. This may seem like an easy puzzle to solve. After all, article 136 TFEU is to be found in Part Three of the TFEU and thus formally satisfies the first condition laid down in article 48(6) TEU. However, the Irish Supreme Court also sought to ascertain whether the decision encroaches on the Union's competence in

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23. *Thomas Pringle v. Gov't of Ireland*, Case C-370/12, [2012] E.C.R. I\_\_\_\_, ¶ 30 (delivered Nov. 27, 2012).

24. *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶ 35 (delivered Nov. 27, 2012). For a closer analysis, see View of Advocate General Kokott, *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶¶ 18–33 (delivered Oct. 26, 2012).

the area of monetary policy and in the area of the coordination of the economic policies of the Member States.

The CJEU concluded that the decision was not capable of affecting the Union's *exclusive* competence in the area of monetary policy as laid down in article 3(1)(c) TFEU. If it had ruled otherwise, this would have made the use of the simplified revision procedure unlawful. Since article 3(1)(c) TFEU is to be found in Part One of the TFEU, the amendment envisaged by the decision could in that event only have been adopted by using the more cumbersome ordinary revision procedure.<sup>25</sup> The Court, however, found, in light of the objectives to be attained by the ESM,<sup>26</sup> the instruments provided to achieve those objectives, and the close link between the ESM and the TFEU provisions relating to economic policy and the regulatory framework for strengthened economic governance of the Union (i.e., the 'Six-Pack'),<sup>27</sup> that the establishment of the ESM falls within the area of economic policy.<sup>28</sup> Indeed, Mr. Pringle could have guessed this simply by studying the TFEU more closely. The legal basis for Union financial assistance to Member States facing severe difficulties caused by natural disasters or exceptional occurrences<sup>29</sup> can be found in Chapter 1 of Title VIII, entitled 'Economic Policy.' Still, it is useful that the Court clarified this point with additional arguments. Mr. Pringle's claim that financial assistance under the ESM is essentially

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25. TEU, *supra* note 2, arts. 48(2)–(5), 2012 O.J. C 326, at 42.

26. According to the Court, the objective pursued by the ESM, which is to safeguard the stability of the euro area as a whole, is clearly distinct from the primary objective of the Union's monetary policy under articles 127(1) and 282(2) TFEU to maintain price stability. *See Pringle*, [2012] E.C.R. I\_\_\_\_, ¶ 56 (delivered Nov. 27, 2012).

27. The term 'Six-Pack' refers to a set of secondary EU law measures that entered into force on December 13, 2011. *See* Council Regulation No. 1173/2011/EU on the Effective Enforcement of Budgetary Surveillance in the Euro Area, 2011 O.J. L 306/1; Council Regulation No. 1174/2011/EU on Enforcement Measures to Correct Excessive Macroeconomic Imbalances in the Euro Area, 2011 O.J. L 306/8; Council Regulation No. 1175/2011/EU on the Strengthening of the Surveillance and Coordination of Economic Policies (amending Regulation No. 1466/97/EC), 2011 O.J. L 306/12; Council Regulation No. 1176/2011/EU on the Prevention and Correction of Macroeconomic Imbalances, 2011 O.J. L 306/25; Council Regulation No. 1177/2011/EU on Speeding Up and Clarifying the Implementation of the Excessive Deficit Procedure (amending Regulation No. 1467/97/EC), 2011 O.J. L 306/33; Council Directive 2011/85/EU on Requirements for Budgetary Frameworks of the Member States, 2011 O.J. L 306/41.

28. *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶ 60 (delivered Nov. 27, 2012).

29. TFEU, *supra* note 2, art. 122(2), 2012 O.J. C 326, at 98.

monetary in character was rightly dismissed. An economic policy measure, the Court stated, cannot be treated as equivalent to a monetary policy measure for the sole reason that it may have indirect effects on the stability of the single currency.<sup>30</sup>

Next, the Court made a crucial observation on the division of competences in the area of economic policy. Since articles 2(3) and 5(1) TFEU, according to the Court, restrict the role of the Union to the adoption of coordinating measures, the Union Treaties “do not confer any *specific* power on the Union to establish a stability mechanism of the kind envisaged by Decision 2011/199.”<sup>31</sup> The Court conceded that article 122(2) TFEU confers on the Union the power to grant *ad hoc* financial assistance to *individual* Member States. It considered that article 122(2) TFEU is nevertheless not an appropriate legal basis for the establishment of a *permanent* stability mechanism, the objectives of which are to safeguard the stability of the euro area *as a whole*.<sup>32</sup> Accordingly, the Court ruled, the euro area Member States are entitled to conclude between themselves an agreement such as the ESM Treaty, provided they do not disregard their duty to comply with EU law.<sup>33</sup> It thus follows that the decision satisfies the condition laid down in article 48(6) TEU that an amendment of the TFEU by means of the

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30. *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶ 56 (delivered Nov. 27, 2012). The Court’s statement reflects the view of Advocate General (“AG”) Kokott, who added that to hold otherwise would lead to the conclusion that economic policy would in its entirety be reserved to the European System of Central Banks (“ESCB”). The rules of the TFEU on the coordination of economic policy would thereby be devoid of meaning. *See* View of Advocate General Kokott, *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶ 85 (delivered Oct. 26, 2012).

31. *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶ 64 (delivered Nov. 27, 2012) (emphasis added).

32. *Id.* ¶ 65. Note that the Court here discreetly settled a disagreement between the President of the Commission and the other Members of the European Council. The European Council Conclusions of December 16–17, 2010, which formally announced that a permanent stability mechanism would be established to safeguard the stability of the euro area as a whole, state that the European Council agreed that article 122(2) TFEU would no longer be needed for such purposes. *See* Eur. Council, Conclusions of December 16–17, 2010, at 1 (Jan. 2011), *available at* [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/118578.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/118578.pdf). The Conclusions also affirm that the Heads of State or Government agreed that article 122(2) TFEU should therefore not be used for such purposes. *See id.* This implies that the President of the Commission was of the opinion that article 122(2) TFEU could be used as a legal basis.

33. *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶¶ 68–69 (delivered Nov. 27, 2012).

simplified revision procedure may concern only Part Three of that Treaty.<sup>34</sup>

B. *Question 2: The Compatibility of the ESM Treaty with EU Law*

With the second preliminary question the Irish Supreme Court sought to ascertain whether various articles in the Union Treaties,<sup>35</sup> as well as the general principles of effective judicial protection and legal certainty, preclude the euro area Member States from concluding and ratifying an agreement such as the ESM Treaty.<sup>36</sup>

1. Compatibility with the ‘No-Bailout’ Clause of Article 125 TFEU

Surely the most eagerly anticipated part of the judgment was the Court’s interpretation of the ‘no-bailout’ clause laid down in article 125(1) TFEU. The question was essentially whether the stability support by the ESM and the rules relating to capital calls are ‘bailouts’ captured by article 125 TFEU.<sup>37</sup> The length of the answer provided by Advocate General (“AG”) Kokott—roughly a third of her View—reflects the difficult position in which both she and the Court found themselves.<sup>38</sup>

On the basis of the wording of article 125 TFEU, the Court found that the ‘no-bailout’ clause was not intended to prohibit all forms of financial assistance by the Union or the Member States.<sup>39</sup> If that were the case, the Court explained, article 122(2) TFEU, which allows the Union to grant *ad hoc* financial assistance, would have had to state that it derogated from article 125 TFEU.<sup>40</sup> Indeed, as has been argued in the literature, a

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34. *Id.* ¶ 70.

35. For the full list of articles, see *supra* Section I.

36. The second question was ruled partly inadmissible insofar as it concerned the interpretation of articles 2 and 3 TEU and the general principle of legal certainty. See *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶¶ 82–91 (delivered Nov. 27, 2012).

37. See View of Advocate General Kokott, *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶¶ 101–03 (delivered Oct. 26, 2012).

38. *Id.* ¶¶ 104–66. Unlike the Court, AG Kokott carefully sets out why she considers ESM financial assistance to fall within the personal scope of article 125(1) TFEU, which is not addressed to an independent international organization such as the ESM. See *id.* ¶¶ 106–12.

39. *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶ 130 (delivered Nov. 27, 2012).

40. *Id.* ¶ 131.

broad interpretation of article 125 TFEU would render article 122(2) TFEU meaningless.<sup>41</sup> Since the stricter wording of article 123 TFEU also supports the view that the ‘no-bailout’ clause does not completely prohibit financial assistance, the Court proceeded by examining which forms of financial assistance are compatible with article 125 TFEU having regard to the objective thereof.<sup>42</sup>

The Court found that article 125 TFEU only prohibits the Union and the Member States from granting financial assistance that diminishes the incentive of the recipient Member State to conduct a sound budgetary policy.<sup>43</sup> It argued that the ‘no-bailout’ clause “ensures that Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline.”<sup>44</sup> The important disciplinary pressure of market forces on the borrowing activities of the Member States was identified as the objective of the ‘no-bailout’ clause early on.<sup>45</sup> The Court identified, however, a *higher* objective. Compliance with budgetary discipline, it held, contributes to the attainment of the financial stability of the monetary union. In a nod to the ECB,<sup>46</sup> the Court determined that financial assistance by the ESM is not compatible with article 125 TFEU *unless* it is indispensable for the safeguarding of the financial stability as a whole and subject to strict conditions.<sup>47</sup>

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41. Jean-Victor Louis, Guest Editorial, *The No-Bailout Clause and Rescue Packages*, 47 COMMON MKT. L. REV. 971, 983–84 (2010) (citing Ulrich Häde, *Haushaltsdisziplin und Solidarität im Zeichen der Finanzkrise*, 20 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 399 (2009)).

42. *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶¶ 132–33 (delivered Nov. 27, 2012). *See also* View of Advocate General Kokott, *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶ 141 (delivered Oct. 26, 2012).

43. *Id.* ¶ 136.

44. *Id.* ¶ 135.

45. Jörn Piskorn, *Legal Arrangements in the Treaty of Maastricht for the Effectiveness of the Economic and Monetary Union*, 31 COMMON MKT. L. REV. 263, 275 (1994).

46. The Court referenced the Opinion of the ECB of March 17, 2011, on the Draft Decision Amending Article 136 of the Treaty on the Functioning of the European Union with Regard to a Stability Mechanism for Member States whose Currency is the Euro (CON/2011/24), 2011 O.J. C 140/8, ¶ 5. With this little nod, the Court found a smart way to reconstruct the scope of article 125 TFEU with the use of the terminology found in article 136(3) TFEU without actually having to refer to the yet-to-be-inserted provision itself.

47. *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶ 136 (delivered Nov. 27, 2012).

To get to this conclusion, the Court did something quite remarkable. Likely inspired by AG Kokott,<sup>48</sup> the Court referred to the preparatory work relating to the Maastricht Treaty to support its finding that the aim of article 125 TFEU is to ensure that the Member States follow a sound budgetary policy.<sup>49</sup> It is certainly not uncommon to have recourse to the *travaux préparatoires* of a treaty as a supplementary means of interpretation under international law,<sup>50</sup> or for that matter in the national context. However, one hardly ever encounters it in the context of primary EU law. Still, this unusual move should not be seen as a strained way of justifying a predetermined outcome. Rather, by emphasizing the original intent of the drafters of the Maastricht Treaty (i.e., the Member States), the Court added legitimacy to its seemingly novel interpretation of the ‘no-bailout’ clause.

The Court’s overall conclusion was that article 125 TFEU does not prohibit the Member States from granting financial assistance to each other via the ESM. It considered that grants of financial assistance by way of credit lines or loans<sup>51</sup> do not imply that the ESM will assume the debts of a recipient ESM Member, but amounts to the creation of new debt. It pointed out that a recipient ESM Member remains responsible for its commitments to its creditors with respect to its existing debt.<sup>52</sup> Other stability support facilities such as the purchase of bonds on the primary and secondary markets,<sup>53</sup> too, do not lead the ESM to assume the debts of a recipient ESM Member.<sup>54</sup> Therefore, at least from

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48. See View of Advocate General Kokott, *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶¶ 128–31 (delivered Oct. 26, 2012).

49. *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶ 135 (delivered Nov. 27, 2012). Both the AG and the Court point out that the prohibition contained in article 125 TFEU finds its origin in article 104b of the Treaty establishing the European Community, as inserted by the Maastricht Treaty in November 1993. See View of Advocate General Kokott, *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶ 128 (delivered Oct. 26, 2012); *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶ 134 (delivered Nov. 27, 2012).

50. See 1969 Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. Note that such interpretation is understood to be complementary to the general rule of interpretation, as laid down in article 31 VCLT. See generally MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 446–48 (2009).

51. TESM, *supra* note 1, arts. 14–16.

52. *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶ 139 (delivered Nov. 27, 2012).

53. TESM, *supra* note 1, arts. 17, 18.

54. *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶¶ 140–41 (delivered Nov. 27, 2012).

a legal perspective, the ESM will not act as the guarantor of the debts of that ESM Member. It thus follows that article 125 TFEU does not preclude the conclusion or ratification of the ESM Treaty by the euro area Member States.<sup>55</sup>

## 2. Compatibility with Exclusive Union Competences in the Area of Monetary Policy and Under Article 3(2) TFEU

The ECB and the central banks of the euro area Member States, which together constitute the Eurosystem, conduct the Union's monetary policy.<sup>56</sup> In carrying out this exclusive competence, their objective is to maintain price stability.<sup>57</sup> Repeating its earlier findings, the Court dismissed the applicant's claim that the activities of the ESM affect price stability in the euro area and therefore encroach upon the Union's monetary policy. The TFEU provisions relating to the Union's exclusive competence,<sup>58</sup> the Court held, do not preclude the conclusion or ratification of the ESM Treaty.<sup>59</sup>

As the preamble of the ESM Treaty states that the ESM will assume the tasks currently fulfilled by the EFSF and EFSM,<sup>60</sup> the Irish Supreme Court inquired whether the Union's competence under article 3(2) TFEU precludes the euro area Member States from concluding or ratifying the ESM Treaty. That provision stipulates that the Union shall have *exclusive* competence to conclude international agreements when the conclusion thereof may affect common rules or alter their scope.<sup>61</sup> The Court

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55. As was noted above, Mr. Pringle also claimed that the rules related to capital calls are caught by the prohibition of article 125 TFEU. The Court dismissed this claim, pointing out that in accordance with article 25(2) TESM, a defaulting ESM Member remains bound to pay its part of the capital. The other ESM Members thus do not act as guarantors of the debt of that ESM Member. See *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶ 145 (delivered Nov. 27, 2012); cf. View of Advocate General Kokott, *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶¶ 161–65 (delivered Oct. 26, 2012).

56. TFEU, *supra* note 2, art. 282(1), 2012 O.J. C 326, at 167; Protocol (No. 4) on the Statute of the European System of Central Banks and of the European Central Bank, 2012 O.J. C 326/230, at 230 (annexed to the Union Treaties art. 1).

57. TFEU, *supra* note 2, arts. 127(1), 282(2), 2012 O.J. C 326, at 102, 167.

58. *Id.* arts. 3(1)(c), 127, 2012 O.J. C 326, at 51, 102.

59. *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶¶ 93–98 (delivered Nov. 27, 2012).

60. See Preamble to TESM, *supra* note 1.

61. Article 3(2) TFEU reads as follows: “The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to

considered that since the EFSF was established outside the Union framework, the assumption of its tasks by the ESM in any event cannot have such effects. Nor does the conclusion or ratification of the ESM Treaty jeopardize the objective pursued by article 122(2) TFEU or the EFSM Regulation.<sup>62</sup> Therefore, the Court stressed once more that the TFEU does not confer a specific power on the Union to establish a permanent stability mechanism.<sup>63</sup> The Union, it argued, is furthermore not prevented by the establishment of the ESM from granting *ad hoc* financial assistance to Member States under article 122(2) TFEU.<sup>64</sup>

### 3. Compatibility with Union Competences in the Area of Economic Policy and the Prohibition of Monetary Financing

Mr. Pringle had suggested that the conditions attached to financial assistance granted by the ESM serve the same function as the Council recommendations under articles 121 and 126 TFEU, and therefore unlawfully encroach on Union competence.<sup>65</sup> Those conditions, the Court explained, may very well take the form of macro-economic adjustment programs, but they do not constitute an instrument for the *coordination* of the economic policies of the Member States, as do the provisions mentioned above. It stated that these conditions are instead intended to ensure that the activities of the ESM are consistent with EU law.<sup>66</sup> The ESM Treaty indeed expressly provides that the Memorandum of Understanding (“MoU”) detailing the conditionality attached to the financial assistance granted to an ESM Member is fully consistent with the measures of economic policy coordination in the TFEU.<sup>67</sup> Coordination of the

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exercise its internal competence, *or in so far as its conclusion may affect common rules or alter their scope.*” TFEU, *supra* note 2, art. 3(2), O.J. 2012 C 326, at 51 (emphasis added).

62. *See supra* note 18.

63. *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶ 105 (delivered Nov. 27, 2012) (referring to paragraphs 64 to 66).

64. *Id.* ¶¶ 104, 106.

65. View of Advocate General Kokott, *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶ 89 (delivered Oct. 26, 2012).

66. *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶¶ 108–12, 114 (delivered Nov. 27, 2012).

67. As one of the European Council’s agents in the *Pringle* case has put it (writing in a personal capacity), the objective of the provision of consistency found in article 13(3) TESM is “to avoid building a rival universe of economic coordination outside the EU Treaties.” *See* Alberto de Gregorio Merino, *Legal Developments in the Economic and*



economic policies of the Member States via the ESM is out of the question, as AG Kokott clarified, “for the simple reason that the conditions represent the requirements of the ESM as imposed on an individual Member State and not a harmonization of the individual economic policies of the Member States.”<sup>68</sup>

The AG is right. While the ESM and other financial assistance mechanisms go hand in hand with strengthened economic policy coordination,<sup>69</sup> they were certainly not designed for that purpose. Her choice of wording is noteworthy, though. With the phrase “imposed on an individual Member State,” the AG openly suggests recipient Member States may have little choice but to accept the far-reaching austerity measures demanded by the “Troika” composed of the European Commission, the ECB, and the International Monetary Fund (“IMF”). As such, it is probably an apt description of the political reality of negotiations between creditor and recipient Member States.<sup>70</sup>

In relation to article 122(2) TFEU, the Irish Supreme Court asked whether that provision exhaustively defines the exceptional circumstances in which it is possible to grant financial assistance to Member States and whether it empowers solely the Union’s institutions to grant financial assistance.<sup>71</sup> Mr. Pringle argued that the ESM encroaches on the Union’s competence to grant financial assistance under article 122(2) TFEU. In his view, financial assistance via the ESM goes beyond the conditions set out in that provision. Article 122(2) TFEU holds that the Council may grant financial assistance if a

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*Monetary Union During the Debt Crisis: The Mechanisms of Financial Assistance*, 49 COMMON MKT. L. REV. 1613, 1635–36 (2012). Even without such provisions, though, EU law would of course prevail in case of conflict on the basis of the principle of primacy of EU law.

68. View of Advocate General Kokott, *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶ 92 (delivered Oct. 26, 2012).

69. See, e.g., Preamble to TESM, *supra* note 1.

70. View of Advocate General Kokott, *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶ 92 (delivered Oct. 26, 2012). The official reading is of course that the European Commission (on behalf of the ESM), in liaison with the ECB and, wherever possible, together with the IMF, and the Member State concerned *negotiate* the Memorandum of Understanding (“MoU”) detailing the conditionality attached to stability support. This implies equality of the negotiating partners. Cf. TESM, *supra* note 1, art. 13(3).

71. *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶ 117 (delivered Nov. 27, 2012).

Member State faces severe difficulties caused by natural disasters or *exceptional occurrences beyond its control*. Thus, only the Union may grant financial assistance—not the Member States or the ESM—and only in the event that the difficulties faced by the recipient Member State are exceptional and unforeseeable in nature. Budgetary difficulties or financing problems, argued Mr. Pringle, do not fall under that category.<sup>72</sup> In this regard, it should be mentioned that the EFSM Regulation explicitly characterized the sovereign debt crisis as such an exceptional situation, caused by the global financial crisis.<sup>73</sup> The ESM Treaty does not. However, the controversy surrounding the legal basis of the EFSM Regulation appears to have been the main reason why the Member States decided to amend article 136 TFEU.<sup>74</sup>

The Court did not answer the Irish Supreme Court's first question concerning article 122(2) TFEU. Instead, in answering the second question, it drew a clear distinction between financial assistance granted by the Union and financial assistance granted by the Member States (via the ESM). As the establishment of the ESM does not affect the Union's exercise of competence and nothing in article 122 TFEU indicates that the Union has *exclusive* competence to grant financial assistance to a Member State, the Court found that the Member States remain free to establish a stability mechanism such as the ESM.<sup>75</sup> This is subject to the proviso that the ESM in its operation complies with EU law, as the Court had already settled.<sup>76</sup>

The Irish Supreme Court had asked, furthermore, whether the ESM Treaty was not in reality intended to circumvent the prohibition of monetary financing found in article 123 TFEU.<sup>77</sup> Again, the CJEU noted that the provision concerned is not addressed to the Member States. Because article 123 TFEU is

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72. Written observations of Thomas Pringle in Case C-370/12, *Thomas Pringle v. Gov't of Ireland*, ¶ 3.39 (on file with the author).

73. EFSM Regulation, *supra* note 18, pmbl.

74. Bruno de Witte, *The European Treaty Amendment for the Creation of a Financial Stability Mechanism*, SIEPS EUR. POLICY ANALYSIS, June 2011, at 6. On the use of article 122.2 TFEU as the legal basis for the EFSM Regulation, see, for example, Kaarlo Tuori, *The European Financial Crisis—Constitutional Aspects and Implications* 28 (Eur. Univ. Inst. Working Paper Law No. 2012/28), and the literature cited therein.

75. *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶¶ 118–21 (delivered Nov. 27, 2012).

76. *Id.* ¶ 121 (referring to ¶¶ 68–69, 111–13).

77. *Id.* ¶ 124.

specifically addressed to the ECB and the national central banks, the grant of financial assistance by a group of Member States is simply not covered by the prohibition. The euro area Member States are thus not “circumventing” article 123 TFEU when they act via the ESM, the Court explained, because they are not derogating from the prohibition laid down in that article.<sup>78</sup> The Court added that there is currently no basis for the view that the funds provided to the ESM might be derived from financial instruments prohibited by article 123(1) TFEU.<sup>79</sup> This short statement will surely inform ongoing discussions about the possibility of granting the ESM a banking license, which would allow it to borrow from the ECB and therefore significantly bolster the ESM’s firepower. For the moment, it remains unclear whether that would be consistent with article 123(1) TFEU in the eyes of the Court.<sup>80</sup>

#### 4. The Allocation of New Tasks to the European Commission and the ECB

As was the case with the Greek Loan Facility and the EFSF, the ESM ‘borrows’ the European Commission and the ECB.<sup>81</sup> For that reason, the Irish Supreme Court asked whether the allocation of new tasks to these institutions is compatible with their respective powers. Besides taking part in the meetings of the ESM’s Board of Governors and Board of Directors as observers,<sup>82</sup> the Commission and the ECB carry out executive tasks as part of the Troika (together with the IMF). They are entrusted to assess requests for stability support by ESM Members,<sup>83</sup> assess the urgency thereof,<sup>84</sup> negotiate the MoU

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78. *Id.* ¶¶ 125–26.

79. *Id.* ¶ 127.

80. See Pieter-Augustijn van Malleghem, Pringle: *A Paradigm Shift in the European Union’s Monetary Constitution*, 14 *GERMAN L.J.* 141, 159 (2013).

81. To this end, the twenty-seven Member States, via an executive agreement under international law, by common accord authorized the euro area Member States to request the Commission and the ECB to perform the tasks set out in the ESM Treaty. See Preamble to TESM, *supra* note 1; Council Document 12114/11, *Decision of the Representatives of the Governments of the Member States of the European Union* (June 24, 2011), available at <http://register.consilium.europa.eu/pdf/en/11/st12/st12114.en11.pdf>.

82. TESM, *supra* note 1, arts. 5(3), 6(2).

83. *Id.* art. 13(1).

84. *Id.* art. 4(4).

detailing the conditionality attached to financial assistance,<sup>85</sup> and monitor compliance with that conditionality.<sup>86</sup> Such use of the institutions outside the framework of the Union Treaties is certainly not unprecedented. In fact, the Court had previously held that the Member States are not precluded from entrusting management and coordination tasks to the institutions in areas of non-exclusive competence.<sup>87</sup>

Those tasks, however, must be compatible with the powers conferred by the Union Treaties and may not alter their essential character. To put it differently, the Member States are allowed to allocate new tasks to the institutions as long as their *competences*, as defined by the Union Treaties, remain unchanged. Since the objective of the ESM Treaty is to ensure the financial stability of the euro area as a whole, the Court held, the Commission's involvement in the ESM Treaty promotes the general interest of the Union and therefore complies with the Court's case law.<sup>88</sup> Similarly, by virtue of its duties within the ESM, the ECB supports the general economic policies in the Union, the Court argued. Therefore, the tasks allocated to the ECB under the ESM Treaty are compatible with its tasks under the Union Treaties.<sup>89</sup>

#### 5. The Jurisdiction of the Court to Decide on ESM-Related Disputes

The Court's assessment of its own jurisdiction to decide on disputes in connection with the interpretation and application of the ESM Treaty, under article 37(3) thereof, is one of the less convincing parts of the judgment. Article 273 TFEU, on which the Court's jurisdiction is directly based,<sup>90</sup> holds that it shall have jurisdiction in any dispute between Member States relating to

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85. *Id.* art. 13(3).

86. *Id.* art. 13(7).

87. *Parliament v. Council and Commission (Bangladesh)*, Joined Cases C-181/91 & C-248/91, [1993] E.C.R. I-3685; *Parliament v. Council (Lomé IV Convention)*, Case C-316/91, [1994] E.C.R. I-625.

88. *Thomas Pringle v. Gov't of Ireland*, Case C-370/12, [2012] E.C.R. I\_\_\_\_, ¶¶ 163–64 (delivered Nov. 27, 2012); *cf.* TEU, *supra* note 2, art. 17(1), 2012 O.J. C 326, at 25.

89. *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶ 165 (delivered November 27, 2012); *cf.* TFEU, *supra* note 2, art. 282(2), 2012 O.J. C 326, at 167.

90. *See* Preamble to TESM, *supra* note 1.

the subject matter of the Union Treaties if the dispute is submitted to the Court under a special agreement.<sup>91</sup> The link with EU law is undeniable. Yet, article 37(2) TESM distinguishes two types of disputes: those between ESM Members and those between an ESM Member and the ESM itself. Given that the ESM is an independent international organization, this second category—formally at least—does not easily fit the description ‘between Member States.’

As becomes clear from article 37(3) TESM, disputes of the second category occur when an ESM Member contests a decision of the Board of Governors, an organ of the ESM acting by qualified majority.<sup>92</sup> Legally speaking, the Court’s assertion that a dispute to which the ESM is a party can be considered to be a ‘dispute between Member States’ since membership of the ESM consists solely of EU Member States may not be entirely correct. It is noteworthy in this respect that the Member States themselves were initially unsure whether this type of dispute would fit the wording of article 273 TFEU, as is demonstrated by article 16(2) of the EFSF Framework Agreement.<sup>93</sup> That provision, too, distinguishes disputes between euro area Member States only and disputes between the euro area Member States and the EFSF, the ESM’s direct predecessor. Disputes of the latter category are to be submitted to the exclusive jurisdiction of the Courts of Luxembourg—not the CJEU.<sup>94</sup> Therefore, a more thorough reasoning by the Court would have been welcome.

Be that as it may, the Court’s pragmatic approach here obviously aims at preserving the autonomy of the EU legal system and is therefore preferable over a strict reading of article

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91. According to the Court, given the objective pursued by article 273 TFEU, such agreement can be given in advance with reference to a whole class of predefined disputes, *in casu* by means of article 37(3) TESM. See *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶ 172 (delivered November 27, 2012).

92. TESM, *supra* note 1, arts. 4(5), 5(7)(m). This makes a decision on a dispute distinct from instances in which the Member States collectively exercise their powers under public international law.

93. The EFSF Framework Agreement of June 7, 2010, is an agreement concluded between the EFSF and the euro area Member States as shareholders of the EFSF.

94. Article 16(2) of the EFSF Framework Agreement provides that a dispute arising from or in the context of the Agreement, to the extent it constitutes a dispute between euro area Member States only, shall be submitted to the exclusive jurisdiction of the CJEU. No mention is made, however, of article 273 TFEU.

273 TFEU. That provision should be read in conjunction with article 344 TFEU, which obliges Member States not to submit disputes on the interpretation or application of the Union Treaties to any method of settlement other than those provided for therein.<sup>95</sup> As such, articles 273 and 344 TFEU were specifically designed to protect the unity of EU law and the interpretation thereof. Since the ESM's Board of Governors is *de facto* just another 'guise' of the euro area Member States closely connected to the Eurogroup,<sup>96</sup> and the ESM Treaty is inextricably linked with the EMU, the Court is in the best position to adjudicate ESM-related disputes.

*C. Question 3: The Legal (In)Significance of Article 136(3) TFEU*

The Court's answer to the third preliminary question might appear remarkably brief, even cryptic. But, to be fair, the answer was rather obvious. The Irish Supreme Court essentially asked whether the euro area Member States were allowed to conclude and ratify the ESM Treaty prior to the entry into force of the decision amending article 136 TFEU. In December 2010, as Mr. Pringle of course pointed out, the European Council explicitly stated that the TFEU "should be amended in order for a permanent mechanism to be established" by the euro area Member States.<sup>97</sup> However, when the hearings in Luxembourg took place, the ESM had recently been inaugurated.<sup>98</sup>

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95. On this obligation, see *Commission v. Ireland (Mox Plant)*, Case C-459/03, [2006] E.C.R. I-4642.

96. Meetings of the Board of Governors usually take place in the margin of Eurogroup meetings, which are itself informal meetings scheduled ahead of regular Economic and Financial Affairs Council ("ECOFIN") meetings. The Chairman of the Board of Governors is currently Dutch Finance Minister Jeroen Dijsselbloem, who is also the President of the Eurogroup.

97. European Council 16–17 Dec. 2010 Conclusions, *supra* note 32, at 1. Note that European Council Decision 2011/199 does not refer to the aforementioned statement, but to the European Council of October 28–29, 2010, at which the Heads of State or Government agreed on the need to establish a permanent crisis mechanism and invited President Van Rompuy to undertake consultations with the members of the European Council on "a limited treaty change to that effect." *Id.*

98. The ESM Treaty entered into force for sixteen Contracting Parties on September 27, 2012. On that day, to ensure conformity with the judgment of the German Federal Constitutional Court of September 12, 2012, representatives of the Contracting Parties issued an interpretive declaration on articles 8(5), 32(5), 34, and 35(1) TESM, *supra* note 1. On October 4, 2012, Estonia was the final Contracting Party

Meanwhile, the decision amending article 136 TFEU was still pending approval by all twenty-seven Member States.<sup>99</sup> So, when the European Council, backed by the Member States and the Commission, argued at the hearings that article 136(3) TFEU is a purely declaratory provision, the contradiction with its earlier assertion as to the necessity of the amendment was evident. The Court nonetheless sided with the European Council. Referring to earlier parts of the judgment, it merely stated that the amendment of article 136 TFEU by the decision confirms the existence of a power possessed by the Member States.<sup>100</sup>

Indeed, any other view on the legal significance of article 136(3) TFEU likely rests on the misconception that this provision serves as a legal basis or authorization for the establishment of the ESM. Seeing as the ESM Treaty was concluded by the euro area Member States under public international law, there was, in any event, simply no need for a legal basis. Since the Court found that the right of a Member State to conclude and ratify the ESM Treaty is not subject to the entry into force of the decision,<sup>101</sup> it is now also abundantly clear that article 136(3) TFEU does not serve as an authorization for the establishment of the ESM.<sup>102</sup> Member States may have limited their sovereign rights by transferring powers to the Union, but their capacity to conclude treaties remains intact. The fact that the ESM Treaty is in substance closely related to

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to ratify the ESM Treaty. The ESM was inaugurated in the margins of a Eurogroup meeting on October 8, 2012.

99. Decision 2011/199 did not as foreseen enter into force on January 1, 2013, because the relevant bill was still awaiting Presidential approval in the Czech Republic, despite having been approved by both houses of parliament. *See* Directorate General for Internal Policies, Policy Department C, Article 136 TFEU, ESM, Fiscal Stability Treaty—Ratification requirements and present situation in the Member States, Eur. Parl. Doc. PE 462.455 (2013). The Decision eventually entered into force on May 1, 2013.

100. *Thomas Pringle v. Gov't of Ireland*, Case C-370/12, [2012] E.C.R. I\_\_\_\_, ¶ 172 (delivered Nov. 27, 2012) (referring to paragraphs 68, 72, and 109).

101. *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶ 185 (delivered November 27, 2012).

102. Note that the German Federal Constitutional Court holds a different view. In its *ESM* ruling, that Court referred to article 136(3) TFEU as an “*Öffnungsklausel*” and argued that the provision “opens up” to the euro area Member States the possibility of establishing the ESM on the basis of an agreement under international law. *See* Bundesverfassungsgericht [Bverfg] [Federal Constitutional Court] Sept. 12, 2012, 2 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1390/12, ¶¶ 233, 236 (Ger.).

the law of the EMU does not mean that it is formally part of the EU legal order. Consequently, from an international law point of view, the entry into force of the ESM Treaty was also not contingent upon EU law. This is why it could precede the amendment of article 136 TFEU.

This does not mean that the proposed insertion of article 136(3) TFEU was never more than an attempt by the German government to placate the judges in Karlsruhe,<sup>103</sup> or a message to financial markets without legal added value. Writing prior to the judgment, De Gregorio Merino suggested that article 136(3) TFEU should be seen as a “provision of a fundamental interpretative value” that provides legal certainty as to the compatibility of the ESM with article 125 TFEU.<sup>104</sup> The new provision, he argued, would introduce the preservation of the stability of the euro area as a new Treaty objective and reconcile this with the objective of monetary stability founded on budgetary discipline, as guaranteed by article 125 TFEU. As De Gregorio Merino rightly noted, in the Union Treaties the term ‘stability’ was hitherto only used in relation to *price* stability.<sup>105</sup>

Article 136(3) TFEU did in fact prove to be a useful interpretative tool, as the Court cleverly reconstructed the scope of article 125 TFEU using terminology found in the yet-to-be-inserted Treaty provision without explicitly referencing it.<sup>106</sup> Seeing as articles 3 and 12(1) TESM mirror the wording of article 136(3) TFEU, this made it especially easy for the Court to positively assess the compatibility of the ESM Treaty with the ‘no-bailout’ clause.<sup>107</sup> At the same time, this also means that there is no longer a need to reconcile the two concepts of stability. After all, the Court identified the preservation of the financial stability of the monetary union as a “higher objective”

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103. Nikolas Busse, *EU-Vertrag: Ein Brüsseler Gipfel für die Karlsruher Richter*, FRANKFURTER ALLGEMEINE ZEITUNG, Dec. 17, 2010, <http://www.faz.net/aktuell/politik/europaeische-union/eu-vertrag-ein-bruesseler-gipfel-fuer-die-karlsruher-richter-11079015.html>.

104. De Gregorio Merino, *supra* note 67, at 1629.

105. *Id.*

106. *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶¶ 136–37 (delivered Nov. 27, 2012). Instead, the Court relied on the Opinion of the ECB, *supra* note 48, the wording of which was of course directly inspired by Decision 2011/199.

107. *Id.* ¶ 142.



of article 125 TFEU itself.<sup>108</sup> Consequently, article 136(3) TFEU is now bereft of any legal purpose besides confirming an already existing power of the euro area Member States.

### III. COMMENTS

Member States often display a schizophrenic attitude towards EU law and the institutional arrangements laid down in the Union Treaties when guarding their prerogatives as sovereign states. This is most apparent in the area of economic policy. The drafters of the Maastricht Treaty, hesitant to relinquish powers to the Union, originally created a decidedly asymmetric legal framework for the EMU. Whereas the euro area Member States have fully transferred the sovereignty to pursue monetary policy to the European System of Central Banks (“ESCB”),<sup>109</sup> articles 2(3) and 5(1) TFEU still “restrict the role of the Union in the area of economic policy to the adoption of coordinating measures.”<sup>110</sup> The introduction to this Article suggests that, in light of the judgment, it is perhaps more appropriate to think of the EMU as an ‘Economic and/or Monetary Union’ rather than an Economic *and* Monetary Union. As *Pringle* shows, the compatibility of the ESM Treaty with EU law hinges essentially on the characterization of economic policy as a *sui generis* category of Union competences.<sup>111</sup> This final section will illustrate that the euro area Member States are, however, to a great degree bound by the Union Treaties. It will furthermore argue that a permanent stability mechanism could also have been established as a Union instrument and an explanation will be given as to why that would have been preferable.

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108. *Id.* ¶ 135.

109. See TFEU, *supra* note 2, arts. 3(1)(c), 127(2), 2012 O.J. C 326, at 51, 102; Protocol (No. 4), *supra* note 56, art. 3(1), 2012 O.J. C 326, at 231.

110. *Pringle*, [2012] E.C.R. I \_\_\_, ¶ 64 (delivered Nov. 27, 2012).

111. *Id.* ¶¶ 64–66, 105, 168, 180. This characterization is not without its critics. It has been argued that it does not adequately reflect reality and could be seen as an attempt by the Member States to guard their (perceived) autonomy. See René Smits, *The European Constitution and EMU: An Appraisal*, 42 COMMON MKT. L. REV. 425, 430–31 (2005) (citing Koen Lenaerts, *The Structure of the Union According to the Draft Constitution for Europe*, in *THE EUROPEAN UNION: AN ONGOING PROCESS OF INTEGRATION* 3, 20 (Jaap W. de Zwaan et al. eds., 2004)).

*A. Euro Area Member States and the Debt Crisis: Free to Do as They Please?*

The economic policies of the Member States and the single monetary policy are inextricably related. In a monetary union, a Member State's fiscal policy choices may have considerable negative effects on the others. Therefore, Member States are required to coordinate their economic policies within the Union, notably on the basis of broad economic policy guidelines<sup>112</sup> within the context of the multilateral surveillance procedure.<sup>113</sup> In doing so, the Member States shall act in compliance with three guiding principles: stable prices, sound public finances, and a sustainable balance of payments.<sup>114</sup> As regards the principle of sound public finances, the disregard of which arguably lies at the heart of the sovereign debt crisis, article 126(1) TFEU unequivocally states that Member States shall avoid excessive government deficits. To this end, article 126 TFEU lays down the excessive deficit procedure.<sup>115</sup> A protocol annexed to the Union Treaties sets the limits on planned or actual government deficit (3% of GDP) and government debt (60% of GDP).<sup>116</sup> Already in 2003, this framework, as augmented by the Stability and Growth Pact ("SGP"), proved insufficiently strict to keep Member States in line.<sup>117</sup>

The sovereign debt crisis painfully exposed the shortcomings of the above-described legal framework. Efforts to

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112. TFEU, *supra* note 2, art. 121(2), 2012 O.J. C 326, at 97.

113. The multilateral surveillance procedure is provided for in TFEU, *supra* note 2, art. 121(3)–(4), 2012 O.J. C 326, at 97–98. Further rules are contained in the 'preventive arm' of the Stability and Growth Pact ("SGP"). See Surveillance and Coordination of Economic Policies, *supra* note 27.

114. TFEU, *supra* note 2, arts. 119(3), 120, 121(1), 2012 O.J. C 326, at 96–97.

115. The excessive deficit procedure is provided for in TFEU, *supra* note 2, art. 126(2)–(13), 2012 O.J. C 326, at 100–01. Further rules are contained in the 'dissuasive arm' of the SGP. See Excessive Deficit Procedure, *supra* note 27.

116. See Protocol (No. 12) on the Excessive Deficit Procedure, 2012 O.J. C 326/279.

117. On the SGP, its ineffectiveness in the 2000s, and subsequent reforms, see Matthias J. Herdegen, *Price Stability and Budgetary Restraints in the Economic and Monetary Union: The Law as Guardian of Economic Wisdom*, 35 COMMON MKT. L. REV. 9 (1998); Fabian Amtenbrink & Jakob de Haan, *Economic Governance in the European Union: Fiscal Policy Discipline Versus Flexibility*, 40 COMMON MKT. L. REV. 1075 (2003); Jean-Victor Louis, *The Review of the Stability and Growth Pact*, 43 COMMON MKT. L. REV. 85 (2006).

reinforce economic governance within the euro area, such as the European Semester, the Six-Pack, the Euro-Plus Pact, and the Fiscal Compact Treaty, should be understood in this context.<sup>118</sup> More problematic in light of the urgently needed financial assistance to Greece and other euro area Member States, however, was the set of provisions immediately preceding article 126 TFEU. The ostensibly strict prohibition of bailouts was particularly troublesome. As Smits has put it, article 125 TFEU warns financial markets that “each Member State is ‘on its own’ and not backed by implicit guarantees from the [Union] or from fellow Member States.”<sup>119</sup> Together with articles 123 and 124 TFEU, the ‘no-bailout’ clause was intended to ensure that market forces exercise pressure on the borrowing activities of Member States, necessitating budgetary discipline.<sup>120</sup> As it turned out, however, the markets proved unreliable to fulfill their task as the final arbiters of euro area Member States’ financial health.<sup>121</sup>

There was no Union instrument in place for financial assistance to euro area Member States when the crisis hit.<sup>122</sup> The 1989 Delors Report had in fact suggested the possibility of financial support based on conditionality, but the drafters of the Maastricht Treaty did not follow up.<sup>123</sup> However, it was clear from the start of the crisis that the Member States were willing to take coordinated action “to safeguard financial stability in the

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118. For a discussion, see Dariusz Adamski, *National Power Games and Structural Failures in the European Macroeconomic Governance*, 49 COMMON MKT. L. REV. 1319 (2012).

119. RENÉ SMITS, *THE EUROPEAN CENTRAL BANK: INSTITUTIONAL ASPECTS* 77 (1997).

120. *Id.*; Pipporn, *supra* note 45, at 275.

121. Louis, *supra* note 41, at 979.

122. Article 143(2) TFEU, *supra* note 2, 2012 O.J. C 326, at 111, enables the Union to grant mutual assistance, but only to Member States with a derogation (i.e., non-euro area Member States). Balance-of-Payments assistance for these Member States has been made possible by Council Regulation No. 332/2002 on Establishing a Facility Providing Medium-Term Financial Assistance for Member States’ Balances of Payments, 2002 O.J. L 53/1 [hereinafter *Medium-Term Financial Assistance for Balances of Payments*].

123. See JACQUES DELORS, *COMM. FOR THE STUDY OF ECON. & MONETARY UNION, REPORT ON ECONOMIC AND MONETARY UNION IN THE EUROPEAN COMMUNITY* 19, 35–36 (Apr. 17, 1989).

euro area.”<sup>124</sup> Confronted with limited resources under the EU budget, the Union and the Member States subsequently resorted to measures, which were “not wholly conventional.”<sup>125</sup> The financial assistance mechanisms they devised—successively, the Greek Loan Facility, the EFSM, the EFSF, and the ESM—all appeared to run counter to the above-described rationale behind the ‘no-bailout’ clause. Yet, European Council President Van Rompuy was tasked to investigate the possibilities of a limited Treaty change “not modifying Article 125 TFEU” to facilitate the establishment of the ESM.<sup>126</sup> Commentators were generally vexed the most, however, by the fact that the Member States created the Greek Loan Facility, the EFSF, and the ESM outside the framework of the Union Treaties. This gave the impression they were circumventing fundamental provisions of EU law through legal trickery. The Member States again took the ‘intergovernmental route’ with the aforementioned Fiscal Compact Treaty, which followed in early 2012. This led to heightened criticism of their piecemeal approach to addressing the roots of the debt crisis and the legal form their solutions took.<sup>127</sup>

The Court’s judgment in *Pringle* is unlikely to mitigate such sentiments. To the contrary, detractors will no doubt see the judgment as further evidence of the erosion of the rule of law at the European level. Yet, given the severity of the sovereign debt crisis and the obvious political consensus among European leaders as to the necessity of a permanent stability mechanism, was it realistic to expect that the Court would strike down the ESM Treaty? After all, at stake was the stability of the euro area as a whole. This does not mean that the euro area Member States can circumvent key EMU-related provisions, such as

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124. See Statement by the Heads of State or Government of the Euro Area, March 25, 2010.

125. View of Advocate General Kokott, *Thomas Pringle v. Gov’t of Ireland*, Case C-370/12, [2012] E.C.R. I\_\_\_\_, ¶ 1 (delivered Oct. 26, 2012) (not yet published).

126. Eur. Council, Conclusions of October 18–19, 2010, at 2 (Nov. 2010), available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/117496.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/117496.pdf).

127. Telling in this respect is the title of a debate held at the European University Institute. See Loïc Azoulay et al., *Another Legal Monster? An EUI Debate on the Fiscal Compact Treaty* (Eur. Univ. Inst. Working Paper Law No. 2012/09). For a critique of the Fiscal Compact Treaty, see also Paul P. Craig, *The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism*, 37 EUR. L. REV. 231 (2012).

article 125(1) TFEU, by switching from the EU legal order to legal regimes set up under public international law. Some Member States did in fact argue that the ESM, as an independent international organization, falls outside the personal scope of application of article 125(1) TFEU.<sup>128</sup> While the Court did not address this particular argument, it appears to follow the view of AG Kokott. She stressed that Member States are required to comply with their obligations under EU law when giving effect to commitments assumed under international agreements. Accordingly, the euro area Member States are bound by the requirements of article 125 TFEU also when they act as ESM Members.<sup>129</sup> Citing the same case law, the Court affirmed that the euro area Member States may not disregard their duty to comply with EU law when exercising their competences to establish a permanent stability mechanism outside the framework of the Union Treaties.<sup>130</sup> In that regard, the Court emphasized that article 136(3) TFEU ensures the ESM will operate in a way that will comply with EU law.<sup>131</sup>

*B. The Integrity of the EMU and the Use of International Agreements*

The European Council has stated that the “next steps in the process of completing EMU [are] based on deeper integration and reinforced solidarity for the euro area Member States.”<sup>132</sup> The establishment of the ESM was a serious first step towards the institutionalization of solidarity amongst euro area Member States after initial temporary financial assistance mechanisms paved the way. In *Pringle*, the Court squared the euro area Member States’ willingness and ability to provide stability support with the rationale behind the ‘no-bailout’ clause. Needless to say, this is a positive development. Further steps currently under discussion in Brussels include the direct recapitalization of banks by the ESM, a Single Resolution

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128. View of Advocate General Kokott, *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶ 107 (delivered Oct. 26, 2012).

129. *Id.* ¶ 109 (citing *Gottardo v. Istituto Nazionale della Previdenza Sociale (INPS)*, Case C-55/00, [2002] E.C.R. I-413, ¶ 33).

130. See *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶ 69 (delivered Nov. 27, 2012).

131. *Id.*

132. Eur. Council, Conclusions of December 13–14, 2012, at 2 (Dec. 2012), available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/134353.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/134353.pdf).

Mechanism, and a European Redemption Fund.<sup>133</sup> Just like solidarity, deeper integration comes at a cost. With the Six-Pack, the Fiscal Compact Treaty, and now the Two-Pack,<sup>134</sup> Member States' room to maneuver in the area of economic policy—in particular when it comes to budgetary policy—is gradually scaled back in an effort to minimize negative spillovers. Here, too, far-reaching measures are currently under discussion. For example, the Commission recently announced it will propose a framework for *ex ante* coordination of major economic policy reforms in the context of the European Semester, as envisaged by the Fiscal Compact Treaty.<sup>135</sup>

Over the past three years, the EMU has been overhauled. It is now common for policy-makers in Brussels to openly speak of completing a “genuine Economic and Monetary Union.” Given this development, it is striking that the Court adheres to a minimalist view of the EMU that is increasingly becoming outdated. As this Article illustrates, the Court drew a hard line between monetary policy and economic policy in *Pringle*. It separated the Monetary Union from the Economic Union with surgical precision, acknowledging the exclusive competence of the Union in the former and affording the euro area Member States substantial freedom in the latter. Although it is fairly obvious that the Court's choice to allow for the ESM to be established outside the Union framework was dictated by the exceptional circumstances detailed above, one could reflect on the consequences for the integrity of the EMU and the constitutional character of the Union Treaties.

As was already argued in the Delors Report, the Monetary Union and the Economic Union “form two integral parts of a single whole.”<sup>136</sup> Notwithstanding the insufficient availability of

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133. For an overview, see Communication from the Commission: A Blueprint for a Deep and Genuine Economic and Monetary Union: Launching a European Debate, COM(2012) 777 final/2 [hereinafter Commission Blueprint].

134. See Regulation 472/2013 of the European Parliament and of the Council on the Strengthening of Economic and Budgetary Surveillance of Member States Experiencing or Threatened with Serious Difficulties with Respect to Their Financial Stability in the Euro Area, 2013 O.J. L 140/1; Regulation 473/2013 of the European Parliament and of the Council on Common Provisions for Monitoring and Assessing Draft Budgetary Plans and Ensuring the Correction of Excessive Deficit of the Member States in the Euro Area, 2013 O.J. L 140/11.

135. Commission Blueprint, *supra* note 133, at 20–21, 42–45.

136. DELORS, *supra* note 123, ¶ 21.

resources under the Union's budget, the establishment of a permanent stability mechanism within the framework of the Union Treaties arguably would have better preserved the integrity of the EMU than the arrangements currently in place. Indeed, both the ECB and the European Parliament voiced their preference for the ESM to be established as a Union instrument rather than an intergovernmental mechanism.<sup>137</sup> The Commission, at one point, also seemed to be of the opinion that a permanent stability mechanism could be established on the basis of the Union Treaties,<sup>138</sup> though it did not defend this position in *Pringle* for obvious reasons. However, the Commission recently stressed that the deepening of the EMU should be done within the Union Treaties and 'intergovernmental solutions' should only be considered on an exceptional and transitional basis. It furthermore submitted that the ESM could eventually be integrated into the EU Treaty framework.<sup>139</sup> But was there truly no possibility of establishing the ESM as a Union instrument? The daunting prospect of having to reach political agreement on an adjustment of the Union's budget—which would require the consent of all Member States—likely had greater influence on the choice to establish the ESM as an international organization than any legal objections.

The Union Treaties contain at least two provisions that could have been considered as a legal basis for the establishment of the ESM as a Union instrument in combination with the provisions on enhanced cooperation.<sup>140</sup> However, in *Pringle*, the Court explicitly ruled out one option, article 122(2) TFEU. As was noted above, the Court considered that this provision "does not constitute an appropriate legal basis for the establishment of a stability mechanism of the kind envisaged by

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137. See Opinion of the ECB, *supra* note 46, ¶ 8; European Parliament Resolution of March 23, 2011 on the Draft European Council Decision Amending Article 136 of the Treaty on the Functioning of the European Union with Regard to a Stability Mechanism for Member States Whose Currency Is the Euro, 2012 O.J. C 247 E/22, ¶ 14.

138. *Pringle*, [2012] E.C.R. I \_\_\_, ¶ 14 (delivered Nov. 27, 2012).

139. See Commission Blueprint, *supra* note 133, at 13, 33.

140. The procedure regulating enhanced cooperation is laid down in article 20 TEU, *supra* note 2, 2012 O.J. C 326, at 56–57, and articles 326 to 334 TFEU, *supra* note 2, 2012 O.J. C 326, at 189–92.

[Decision 2011/199],” the objective of which is to “safeguard the stability of the euro area as a whole.”<sup>141</sup> From this rather terse assessment we may gather that the Court finds the permanent nature of the ESM to be incompatible with the requirement in article 122(2) TFEU that financial assistance be granted to a Member State in difficulties caused by *exceptional* occurrences beyond its control.

Following this line of reasoning, the exceptional nature of such occurrences allows only for temporary financial assistance. However, stability support provided by the ESM is by definition temporary, as the ESM can only grant support if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States.<sup>142</sup> Support should consequently cease once financial stability of the recipient Member State (and the euro area as a whole) has been secured. Therefore, stability support provided by the ESM could just as easily be considered compatible with article 122(2) TFEU in this respect. The permanent nature of the mechanism that is used to provide stability support does not change that.

One could further argue that the objective of safeguarding the stability of the euro area as a whole, too, is compatible with article 122(2) TFEU. The provision refers to *a Member State*—singular—in difficulties or threatened with severe difficulties. That should not necessarily lead to the conclusion that a financial assistance mechanism cannot be established as a Union instrument, though. After all, article 122(2) TFEU previously served as the legal basis for the EFSM Regulation, which had an even broader objective; namely, to preserve the financial stability of the Union.<sup>143</sup> It is worthy to note that the objective of the ESM is not, as the Heads of State or Government have claimed and the Court suggested,<sup>144</sup> solely safeguarding the stability of the euro area as a whole. The purpose of the ESM is to provide stability support to the benefit of its Members if indispensable to safeguard the financial stability of the euro area as a whole *and*

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141. *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶ 65 (delivered Nov. 27, 2012).

142. See TESM, *supra* note 1, arts. 3, 12(1).

143. See EFSM Regulation, *supra* note 18, art. 1.

144. *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶ 65 (delivered Nov. 27, 2012); Preamble to Decision 2011/199, *supra* note 9; European Council 16–17 Dec. 2010 Conclusions, *supra* note 32, at 1.



of its Member States.<sup>145</sup> As the former objective can only be achieved—at least within the limits of the ESM Treaty—by contributing to the financial stability of individual Member States, excluding article 122(2) TFEU as a possible legal basis for a permanent stability mechanism seems overly formalistic.

Had it been decided to establish the ESM as a Union instrument, the flexibility clause of article 352 TFEU would have been an alternative option. In *Pringle*, the Court did not rule out the possibility of establishing a permanent stability mechanism on the basis of article 352 TFEU. It merely stated that the availability of this provision as a possible legal basis does not impose on the Union any obligation to act.<sup>146</sup> The substantive requirements article 352(1) TFEU places on the adoption of appropriate measures by the Council, where the Union Treaties have not provided the necessary powers to attain one of the objectives set out therein, appear to have been fulfilled. With reference to article 3(4) TEU, it could be argued that the establishment of a permanent stability mechanism by the Union would be necessary to preserve the stability of the euro area as a whole. As the Court indicated in *Pringle*, maintaining the financial stability of the Monetary Union can be identified as an inherent objective of the Union Treaties.<sup>147</sup>

Can the Member States still have recourse to international agreements when the Union Treaties also provide for the possibility of the Union to take the same or similar action? The Court's *Bangladesh* case law, on which the *Pringle* judgment builds,<sup>148</sup> would suggest they can. *Bangladesh* concerned an act adopted by the representatives of the Member States meeting within the Council (i.e., an executive agreement under international law), that was challenged by the European Parliament. The Court ruled that the Member States are not precluded from exercising their competence collectively in areas in which the Union does not have exclusive competence.<sup>149</sup> The Court's *Bangladesh* doctrine is premised on an international law

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145. TESM, *supra* note 1, art. 3.

146. *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶ 67 (delivered Nov. 27, 2012).

147. *Id.* ¶ 135.

148. *See id.* ¶ 69.

149. *Parliament v. Council and Commission (Bangladesh)*, Joined Cases C-181/91 & C-248/91, [1993] E.C.R. I-3685, ¶ 16.

approach to the issue of Member States concluding parallel agreements between themselves outside the framework of the Union Treaties and can indeed be defended from that perspective. However, the use of parallel agreements in cases where the Union could also have acted has been viewed with some suspicion. It has been argued that the Member States, by abandoning the framework of the Union Treaties, evade the constitutional principles and guarantees enshrined therein.<sup>150</sup> This latter approach, as opposed to the international law approach, acknowledges the constitutional value of the Union Treaties. Opting for the ‘intergovernmental route’ necessarily has consequences for democratic and judicial control in the Union. Even if the Member States do allocate tasks to the Union’s institutions within the framework of the newly created legal regime, *they* set the parameters within which the selected institutions operate—not the Union Treaties. As such, the conclusion of parallel agreements by the Member States could even be considered at odds with the principle of sincere cooperation.<sup>151</sup>

If one accepts that the ESM or a similar stability mechanism could have been established on the basis of the Union Treaties and that parallel agreements concluded between the Member States go against the very idea of the Union Treaties having constitutional value, the next question should be why EU law should nonetheless allow the euro area Member States to conclude partial agreements. In principle, partial agreements (i.e., international agreements between smaller groups of Member States outside the framework of the Union Treaties)<sup>152</sup> are acceptable under certain circumstances. As long as they do not disregard their duty to comply with EU law, Member States should be able to conclude, for example, bilateral tax treaties or

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150. Bruno de Witte, *Chameleonic Member States: Differentiation by Means of Partial and Parallel International Agreements*, in *THE MANY FACES OF DIFFERENTIATION IN EU LAW* 231, 265 (Bruno de Witte et al. eds., 2001).

151. TEU, *supra* note 2, art. 4(3), 2012 O.J. C 326, at 18. In *Pringle*, however, the Court concluded that article 4(3) TEU does not preclude the euro area Member States from concluding and ratifying the ESM Treaty, as the establishment of the ESM does not infringe the provisions of the TFEU. See *Pringle*, [2012] E.C.R. I\_\_\_\_, ¶¶ 151–52 (delivered Nov. 27, 2012).

152. The typology used here is derived from de Witte, *supra* note 150.

seek further integration under the ‘Benelux clause.’<sup>153</sup> Partial agreements by a substantial group of Member States, however, are not necessarily less detrimental to the integrity of the EU legal order than parallel agreements. The drafters of the Amsterdam Treaty seemed to have realized this when they introduced the enhanced cooperation procedure and decided to incorporate the Schengen *acquis* into the framework of the Union Treaties.<sup>154</sup> One could argue that the decision of *all* euro area Member States to establish the ESM outside the framework of the Union Treaties has exactly the same consequences for democratic and judicial control, insofar as the EMU is concerned, as a parallel agreement would have Union-wide.

As discussed above, the ESM makes use of the Union’s institutions.<sup>155</sup> Yet, democratic and judicial control over the ESM is limited by the euro area Member States’ decision to step outside the framework of the Union Treaties. For example, the Commission cannot challenge acts adopted by the Board of Governors before the Court on the basis of article 263 TFEU, as the Council is formally not involved. While the Commission could start infringement proceedings under article 258 TFEU, that step is not lightly taken—especially against all seventeen euro area Member States. As meetings of the Board of Governors take place in the margin of Eurogroup meetings, which are informal by definition,<sup>156</sup> this significant and controversial new area of EMU decision-making is essentially detached from the Union’s institutional framework. Meanwhile, the European Parliament was shut out from the process of establishing the ESM altogether.<sup>157</sup> What is more, neither the Board of Governors nor the Troika can be held accountable to the European Parliament. Had a permanent stability mechanism been established as a Union instrument, on the basis of either

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153. TFEU, *supra* note 2, art. 350, 2012 O.J. C 326, at 195.

154. See Helmut Kortenberger, *Closer Cooperation in the Treaty of Amsterdam*, 35 COMMON MKT. L. REV. 833, 835 (1998) (written under a pseudonym).

155. See *supra* Section II.B.4.

156. See Protocol (No. 14) on the Euro Group, 2012 O.J. C 326/283.

157. While the European Parliament was consulted on the amendment of article 136 TFEU, *supra* note 2, 2012 O.J. C 326, at 106, as required by article 48(6) TEU *supra* note 2, 2012 O.J. C 326, at 42, the European Council did not take over any of the amendments suggested by the European Parliament in its Opinion, *supra* note 137.

article 122(2) or 352 TFEU, its involvement would at least have been guaranteed.

One could speculate what the Court would have made of the ESM Treaty had it been concluded under different circumstances. For example, in the event that the euro area Member States had deemed the establishment of the mechanism an important precautionary measure in times of economic stability. Imagine for a moment that the Commission had started infringement proceedings against these Member States, unlikely as that may seem. Facing similar legal questions, would the Court have come to the same conclusions as it did in *Pringle* or would it have sent the Member States back to the drawing board? More than likely, Court watchers and Brussels insiders would not have been as sure about the outcome of the case as they were in November 2012.

#### CONCLUSION

In *Pringle*, the Court had to choose between putting the stability of the euro area at risk—which arguably would have been the result of strictly applying article 125 TFEU—and reducing article 136(3) TFEU to an essentially superfluous provision before it even entered the Treaty. Given the circumstances, sacrificing article 136(3) TFEU was the only reasonable option. Although the European Council initially presented the first amendment of the Union Treaties since the troubled ratification of the Lisbon Treaty as an instrumental step in setting up the ESM, few will contest its current view that the new provision is not that important after all. Meanwhile, the ‘no-bailout’ clause remains a key provision underpinning the EMU; the ESM Treaty represents a serious first step towards the institutionalization of solidarity within the euro area, but it has not transformed the EMU into a transfer union. Importantly, the Court’s inventive interpretation of the ‘no-bailout’ clause leaves its original purpose intact. Financial assistance by means of the ESM was explicitly made compatible with article 125 TFEU only if subject to strict conditionality. This temporarily relieves recipient Member States from the disciplinary forces of the market, but it nonetheless prompts them to implement sound budgetary policies. Ultimately, that was what the ‘no-bailout’ clause was supposed to ensure.

The severity of the sovereign debt crisis has led to a broad political consensus on the necessity of a permanent stability mechanism in Europe, if not always on the size of the financial assistance or the appropriateness of the drastic austerity measures demanded from recipient Member States. Squaring the euro area Member States' willingness and ability to provide stability support with the rationale behind the 'no-bailout' clause was no easy task. The Court should be applauded for achieving this. Yet, at the same time, the *Pringle* judgment also leaves the euro area Member States considerable freedom to give their response to the sovereign debt crisis shape outside the confines of the Union Treaties. While that is certainly defensible and backed up by the Court with sound legal reasoning, it has consequences for democratic and judicial control in the Union.